

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

August 28, 2023

FOR THE TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

LEROY EDWARD GILBERT,

Petitioner - Appellant,

v.

CARRIE BRIDGES,

Respondent - Appellee.

No. 23-5059
(D.C. No. 4:20-CV-00308-GKF-JFJ)
(N.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **MATHESON, BRISCOE, and EID**, Circuit Judges.

Leroy Edward Gilbert, an Oklahoma state prisoner proceeding pro se,¹ seeks a certificate of appealability (“COA”) to challenge the district court’s denial of his 28 U.S.C. § 2254 application for a writ of habeas corpus. *See* 28 U.S.C. § 2253(c)(1)(A) (requiring a COA to appeal “the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

¹ Because Mr. Gilbert appears pro se, “we liberally construe his filings, but we will not act as his advocate.” *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

court”). Exercising jurisdiction under 28 U.S.C. §§ 1291 and 2253(a), we deny his request for a COA and dismiss this matter.

I. BACKGROUND

In 2014, investigators matched Mr. Gilbert’s DNA to a sample taken from the scene of a 1994 cold case murder. Further investigation matched his fingerprints to latent prints taken from the scene. Prosecutors charged him with the murder of Erma Jean Goodou. In 2017, a jury convicted him of first-degree murder with malice aforethought. The trial judge, agreeing with the jury’s recommendation, sentenced Mr. Gilbert to life in prison without the possibility of parole. The Oklahoma Court of Criminal Appeals (“OCCA”) affirmed Mr. Gilbert’s conviction and sentence. ROA, Vol. I at 50-70. On post-conviction review, the Tulsa County District Court denied his pro se application, and the OCCA again affirmed. *Id.* at 46-49.

Mr. Gilbert then filed his § 2254 application. He claimed (1) ineffective assistance of counsel in violation of the Sixth Amendment, (2) deprivation of due process based on cumulative trial errors in violation of the Fourteenth Amendment, (3) violation of the Sixth Amendment based on the prosecution’s failure to produce exculpatory evidence, and (4) violation of due process under the Fourteenth Amendment because he is actually innocent. The district court denied habeas relief and declined to issue a COA. ROA, Vol. I at 71-99. Mr. Gilbert seeks a COA from this court.

II. DISCUSSION

A. *Legal Background*

1. COA and AEDPA Standards

Mr. Gilbert must obtain a COA for this court to review the district court’s denial of his § 2254 application. *See* 28 U.S.C. § 2253(c)(1)(A). To do so, he must make “a substantial showing of the denial of a constitutional right.” *Id.* § 2253(c)(2). For claims denied on the merits, Mr. Gilbert “must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). For the claims denied on procedural grounds, he must demonstrate “that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right *and* . . . whether the district court was correct in its procedural ruling.” *Id.* (emphasis added).

Our consideration of Mr. Gilbert’s request for a COA must account for the Antiterrorism and Effective Death Penalty Act (“AEDPA”), which requires “deferential treatment of state court decisions.” *Dockins v. Hines*, 374 F.3d 935, 938 (10th Cir. 2004). Under AEDPA, when a state court has adjudicated the merits of a claim, a federal district court cannot grant habeas relief on that claim unless the state court’s decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” 28 U.S.C. § 2254(d)(1), or “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding,” *id.* § 2254(d)(2). When the district court has denied § 2254 habeas relief on the merits, we must determine as part of our COA analysis

whether reasonable jurists would debate the court's decision in light of AEDPA deference to the state court. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

2. Ineffective Assistance of Counsel

To establish ineffective assistance of counsel, an applicant must show (1) constitutionally deficient performance that (2) resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). If the applicant cannot show either “deficient performance” or “sufficient prejudice,” the ineffective assistance claim “necessarily fails.” *Hooks v. Workman*, 606 F.3d 715, 724 (10th Cir. 2010).

To show deficient performance, the application must establish that counsel's performance “fell below an objective standard of reasonableness.” *Strickland*, 466 U.S. at 688. To meet this requirement, the defendant must overcome a “strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance . . . [and] might be considered sound trial strategy.” *Id.* at 689 (quotations omitted). As *Strickland* noted, “[t]here are countless ways to provide effective assistance in any given case,” and “[e]ven the best criminal defense attorneys would not defend a particular client in the same way.” *Id.*

To show prejudice, the applicant must establish that “counsel's errors were so serious as to deprive him of a fair trial, a trial whose result is reliable.” *Hooks*, 606 F.3d at 724 (quotations omitted). An applicant may do this by showing “a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. “[M]ere speculation is not sufficient to satisfy this burden.” *Byrd v. Workman*, 645 F.3d 1159, 1168 (10th

Cir. 2011). “Instead, a reasonable probability is one sufficient to undermine confidence in the outcome.” *Hooks*, 606 F.3d at 724 (citations and quotations omitted).

Finally, federal courts must review the OCCA’s resolution of Mr. Gilbert’s ineffective assistance claims “through AEDPA’s deferential lens.” *Frost v. Pryor*, 749 F.3d 1212, 1225 (10th Cir. 2014); *see also Lockett v. Trammell*, 711 F.3d 1218, 1248 (10th Cir. 2013) (“[W]e review [the OCCA’s] analysis [of ineffective assistance of counsel claims] under the considerable deference required by *Strickland* itself—in addition to AEDPA deference.”).

B. *Analysis*

In his brief to this court, Mr. Gilbert seeks a COA on three issues. Aplt. Br. at 2-3. We see no basis to grant him one.

1. **Standard for Harmless Error on Erroneous Jury Instruction**

Mr. Gilbert argues the district court applied the “wrong law” to assess whether an erroneous jury instruction used at his trial was harmless. Aplt. Br. at 2. This issue stems from the Oklahoma state trial court’s instructing the jury that state law required defendants convicted of certain crimes, including first-degree murder, to serve 85% of their sentence before becoming eligible for parole consideration (“the 85% Rule”). As the State conceded and the OCCA confirmed on direct appeal, the trial court erred in giving this instruction because the 85% Rule did not apply to crimes committed before March 1, 2000, and Mr. Gilbert was charged with committing a 1994 murder. *See ROA*, Vol. I at 58.

The OCCA, affirming on direct appeal and applying plain-error review, concluded Mr. Gilbert had not shown that the instruction error affected his substantial rights.

Id. at 59.² It also said that even if there were plain error, it was harmless. *Id.* The OCCA then analyzed the prosecutor’s reference to the 85% Rule in closing argument, and, again applying plain-error review, said it did not affect Mr. Gilbert’s substantial rights.

Id. at 62-65. Finally, the OCCA rejected Mr. Gilbert’s claim that trial counsel was ineffective for failure to object to the instruction or to the prosecutor’s comments on the 85% Rule, concluding that he had not shown prejudice under *Strickland*. *Id.* at 65-66.

The OCCA also affirmed the denial of post-conviction relief, concluding Mr. Gilbert’s claim that appellate counsel was ineffective for failure to raise this issue on appeal failed on both the deficient performance and prejudice prongs of *Strickland*. *Id.* at 47-48.

The district court, in rejecting Mr. Gilbert’s § 2254 application, said the OCCA’s resolution of Mr. Gilbert’s claims about the jury instruction and the prosecutor’s closing argument comment on the 85% Rule no-prejudice determination was objectively reasonable under 28 U.S.C. § 2254(d)(1). *Id.* at 82-84. It also said that Mr. Gilbert had not shown that the OCCA’s determination that trial counsel’s failure to object was not prejudicial under *Strickland* was unreasonable under § 2254(d)(1). *Id.* at 78-82.

² As the OCCA explained, “[T]he error actually inured to [Mr. Gilbert’s] benefit. The jury was informed that [he] would have to serve 85% of his sentence before he could be considered for parole when, in-fact, he will be eligible for parole consideration much earlier.” *Id.* at 61 (citations omitted).

In his brief, Mr. Gilbert limits his argument to the jury instruction and does not mention the prosecutor's closing argument. He argues the district court should have applied the harmless-error standard for constitutional error under *Chapman v. California*, 386 U.S. 18 (1967). We need not resolve that question because the OCCA rejected Mr. Gilbert's 85% Rule jury instruction issue for failure to show the error affected his substantial rights under plain-error review. ROA, Vol. I at 59. It addressed harmless error as an alternative ground to affirm. *See id.* ("Even if we were to find that the challenged instruction constituted plain error, we would find that this error was harmless."). The district court discussed both the OCCA's plain-error and harmless-error determinations. *Id.* at 80, 82-83. Reasonable jurists would not debate the district court's conclusion that the OCCA's substantial rights determination on plain error review was reasonable.³ We deny a COA on the instructional error claim.⁴

³ If it were not clear whether the district court relied on the plain-error/substantial rights ground, we may deny a COA on a ground that is supported by the record even if the district court did not rely on it. *See Davis v. Roberts*, 425 F.3d 830, 834 (10th Cir. 2005).

⁴ Mr. Gilbert contends that his argument also "alters the harmless error standard the OCCA was required to use on the merits of Appellant's ineffective assistance of appellate counsel claim." Aplt. Br. at 2. But, as noted above, the prejudice test under *Strickland* requires him to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Also, the OCCA affirmed denial of Mr. Gilbert's ineffective assistance of appellate post-conviction claim for failure to show *both* deficient performance and prejudice. ROA, Vol. I at 47-48.

2. Ineffective Assistance of Appellate Counsel for Failure to Make Circumstantial Evidence Argument

Mr. Gilbert argues:

Appellant would note that when evidence against a defendant is wholly circumstantial, it must exclude every reasonable hypothesis other than guilt. *Greer v. State*, 763 P[.]2d 106, 107. Appellate counsel failed to argue this law with respect to insufficiency of the evidence. This should have triggered.

Aplt. Br. at 2. Mr. Gilbert did not present an argument to the district court in his § 2254 petition that his appellate counsel failed to argue a point of law. ROA, Vol. I at 24. His forfeiture of that argument in district court and failure to argue plain error in this court constitutes waiver. *See Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1128-31 (10th Cir. 2011).⁵ To the extent Mr. Gilbert is trying to challenge the district court’s analysis of the sufficiency of the evidence, the district court “independently reviewed the trial transcripts” and could not say the “OCCA’s decision is factually or legally unreasonable.” ROA, Vol. I at 91. Mr. Gilbert’s cursory argument about “reasonable hypothes[es]” does not show how reasonable jurists would debate the district court’s denial of habeas relief on the ineffective assistance of appellate counsel claim. We deny a COA on the appellate counsel circumstantial evidence issue.

⁵ Though Mr. Gilbert is pro se, he is subject to the same procedural rules governing other litigants. *See United States v. Green*, 866 F.3d 1300, 1307-08 (10th Cir. 2018) (stating that a litigant’s pro se status did not excuse compliance with the general procedural rule).

3. Ineffective Assistance of Appellate Counsel for Failure to Make Sufficiency of Evidence Argument

Mr. Gilbert argues:

Mere presence or acquiescence, without participation, does not constitute a crime. [*Torres v. State*,] 962 P[.]2d 3 (1998). With respect to the ineffective assistance of appellate counsel claim, the evidence at trial only establishes Appellant’s presence *at some unknown time*. Appellate counsel was ineffective for not arguing the law as described above with respect to insufficiency of the evidence.

Aplt. Br. at 3. This argument was also waived. Mr. Gilbert did not present it to the district court in his § 2254 petition, ROA, Vol. I at 21, or argue plain error here.

See Richison, 634 F.3d at 1128-31. We deny a COA on the “mere presence” issue.

III. CONCLUSION

We deny a COA and dismiss this matter.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge